Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 09-152
Great Lakes Communications Corp. and Superior Telephone Cooperative Petition for Declaratory Ruling.	)	

To: The Commission

COMMENTS OF FUTUREPHONE.COM, LLC

Futurephone.com. LLC ("Futurephone"), by its attorneys, hereby submits comments in the above-captioned proceeding pursuant to the Commission's Public Notice released on August 20, 2009. In support hereof, the following is respectfully shown:

I. Statement of Interest

Futurephone provides an Internet-based service that enables U.S. consumers to make overseas calls *via* the Internet at prices that are substantially less expensive than those charged by conventional interexchange carriers ("IXCs"). Futurephone has a strong interest in this proceeding as its survival as an alternative service provider, and consumer access to these alternative services, in large part hinges upon the regulatory decisions that the FCC will render here and in related FCC proceedings.

Futurephone was founded in 2006 by two telecommunications entrepreneurs, Thomas Doolin and John Lawless. Futurephone was funded entirely by Messrs. Doolin and Lawless, who invested more than $1 million of their own money to launch the company.

John Lawless is Futurephone's Chief Executive Officer. He has a Bachelor of Science

degree in Electrical Engineering, and a Masters Degree in Electrical Engineering from New York University. He has over thirty years of telecommunication experience, including five years at AT&T, 10 years at Sprint, and 15 years as a telecommunications entrepreneur.

Thomas Doolin is the President of Futurephone. He has over fifteen years telecommunications experience, three years at New Media Telecommunications, and 12 years as a telecommunications entrepreneur.

II. Futurephone's International Internet Service

From October 2006 until February 2007, Futurephone provided a unique service whereby, for the cost of a call to Iowa or Minnesota, consumers could access the Internet and communicate overseas for no additional charge. During this time, U.S. callers placed *over 7 million requests* for Futurephone's service. This service entailed a Local Exchange Carrier (LEC) terminating voice traffic at a Futurephone Internet portal. The caller was then prompted to enter the country code and telephone number of the party to be reached. Futurephone transmitted the call overseas *via* the Internet. Futurephone itself paid significant terminating access fees to overseas service companies who in turn handed off this Internet traffic to carriers who delivered this traffic to its ultimate destination.

When Futurephone launched its service in October 2006, it rapidly became very popular. Several million people utilized Futurephone's service to make economical international calls from their own phones. Futurephone did not charge a fee for its service, rather, it recovered its costs of providing that service through contractual arrangements with LECs that terminated service at Futurephone's Internet portals.

In order to provide this Internet service, Futurephone needed to obtain telephone numbers, IP addresses and termination services from various LECs. A typical call to Futurephone's service originated outside of the exchange areas served by the Defendant LECs. Successful transmission of such a call to Futurephone required three telecommunications carriers: an originating LEC, an IXC and a terminating LEC. The originating LEC would receive the transmission from the caller, then "hand off" the call to an IXC at the IXC's local point-of-presence ("PoP"). The call would then traverse the IXC's network to the exchange area served by a LEC, where the IXC would hand the call off to a LEC at the local PoP. The terminating LEC then provided switched access service to deliver and terminate the call at one of Futurephone's local Internet portals. All inbound calls to Futurephone's Internet portal terminated in the U.S., not overseas, which is another legal matter certain IXCs have attempted to obscure or cause confusion.

At that point, Futurephone's Internet service would prompt the caller to enter the country code and overseas telephone number he or she was trying to reach. When the correct number was entered, Futurephone would provide access to the Internet for people to place a new call through one of Futurephone's servers, and that call would be transmitted overseas to its destination *via* the Internet.

Futurephone's service was cut short only a few months after it was launched due to certain large IXCs who refused to pay legally tariffed access termination charges to the LECs that served Futurephone's Internet portals. At the same time, these IXCs launched a series of legal actions against Futurephone and others, such as the Iowa Utilities Board proceeding, with the obvious intent of snuffing out competitive service offerings such as those provided by Futurephone.

III. The FCC Should Resolve Basic Jurisdictional Questions

The FCC presumably has been following the myriad adjudication and regulatory matters that have been on-going for several years with regard to these access charge disputes. Many of the same questions keep recurring in these proceedings. The FCC could save carriers, their customers and the public at large a lot of needless legal expensive, confusion and expense (in the form of having to pay unreasonably high charges for services that could be offered at more reasonable rates by Futurephone and other Internet-based services) by clearly stating that existing federal law and FCC precedents govern many aspects of these cases, including those federal issues that the Iowa Utilities Board has apparently taken under its own consideration. Many of these disputes could be resolved expeditiously if the FCC were to issue a succinct statement of relevant law.

For instance, the FCC has consistently held that entities such as Futurephone that utilize LEC services to provide others with access to the Internet (e.g., Internet Service Providers ("ISPs")) are deemed "end-users" of telecommunications services.[1] ISPs are not "co-carriers" or some other category of regulated service, notwithstanding IXC statements to the contrary; they have for years been deemed "end users" or "customers" by the FCC; there's no reason why the FCC couldn't simply reaffirm that holding in the context of this or other pending FCC proceedings. As affirmed by the U.S. Court of Appeals for the Fifth Circuit, the Commission has consistently treated ISPs and similar providers as end-users.[2] Likewise, the U.S. Court of Appeals for the D.C. Circuit has held that Internet access providers like Futurephone are the

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[1] See Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, ¶11 (2001).
[2] See Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission, et al., 4-050CV-1264 (2006) at 13.

"called parties" respecting telecommunications service delivered to them, and, that the telecommunications service so provided terminates at their portals.

Terminating LECs provide switched access services to IXCs, for the benefit of the IXC's customers, pursuant to federal access services tariffs. It should not be controversial for the FCC to clearly state that only federal tariffs govern interstate calling arrangements of this sort. In accordance with those federal tariffs, LECs have submitted invoices to IXCs for charges associated with the access services they provided, including the delivery and termination of traffic to Futurephone's Internet portals. This type of calling arrangement has nothing to do with state issues, policies or laws.

Many IXCs, apparently concerned about increased traffic to Internet-based services such as Futurephone's, have elected to engage in self-help and have chosen not to pay federal access charges. This, too, is a legal issue that ought not be open to debate or dispute and could be readily resolved by the FCC. The FCC has routinely held that carrier's cannot engage in self-help and not pay lawfully tariffed charges; the appropriate remedy for them is to pay the charge and initiate a formal dispute proceeding, if they are so inclined. The Commission has found it decidedly unreasonable (i.e., a violation of Section 201(a) of the Act) for an IXC to cease paying access charges to a LEC when it results in harm to customers that have received service through both companies.[3] Moreover, the Commission has stated that an IXC's refusal to provide service to the end user of a CLEC charging legal rates, while serving customers of other LECs in the

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[3] See MGC Communications, Inc. v AT&T Corp., 15 FCC Rcd 308, ¶ 7 (1999).

same geographic area is an unreasonable denial of service in violation of Section 201(a) of the Act.[4]

A party that is dissatisfied with a service provided by a telephone company must pay the tariffed rate that is paid by all other customers and then file a complaint with the FCC under 47 U.S.C. § 208. In one of many cases on point, the FCC determined in *In re Communique Telecommunications, Inc.*, 10 FCC Rcd 10399, 10405 n. 73 (1995), that a customer is not entitled to the self-help measure of withholding payment, but should first pay, under protest, the amount allegedly due, and then seek relief through the appropriate forum regarding its claims that the tariff does not apply. It would hardly be controversial for the FCC to instruct the IXCs in these myriad proceedings that FCC prohibitions against "self help" most certainly apply to them.

IV. Futurephone is an End-User of LEC Services

The FCC should clarify in this proceeding that domestic terminating access tariffs apply to services such as Futurephone's, that Futurphone is an ISP or an "Enhanced Service Provider," and that inbound calls to Futurephone's portal terminate in the U.S. Absent clear guidance from the FCC on this legal matter, we may be facing a long series of inappropriate rulings from various state regulatory entities as well as from state and federal courts.

The applicable federal tariff system provides a useful and usual mechanism for initiation of new, alternative services that are provided via local exchange facilities.[5] While Futurephone used the Internet to deliver calls overseas, it still required LECs to deliver and terminate telecommunications traffic at its Internet portals. Futurephone's service is therefore covered under the LECs' terminating access tariffs.

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[4] See In re Access Charge Reform, 19 FCC Rcd 9108, ¶ 59 (2004).

As illustrated by interstate access tariffs filed by two LECs serving Futurephone, Futurephone was the called party for IXC traffic that was delivered to its portals, i.e., they terminated IXCs' traffic at Futurephone's Internet portals and may assess access charges on IXCs for that service. Both of these tariffs LECs state that an "end user" of their access services is defined as "any customer [that is] not a carrier," and in turn defines "customer" as "any entity which subscribes to the services offered under this tariff."[6]

In the recent Farmers & Merchant's decision, the Commission in reviewing a similar tariff held that a customer/end user of a LEC's service is any entity that subscribes, i.e., enters its name for service by a LEC, regardless of whether that entity pays the LEC for service.[7] The Commission also stated that a LEC's payment of marketing fees to an entity that subscribes to its service does not affect its status as a customer or end user.[8] The IXCs have created much mischief in various regulatory and adjudicatory proceedings by suggesting that this statement of law may be in doubt; the FCC could resolve many of these disputes simply by stating that it is not.

V. IXCs Should not be Permitted to Engage in Illegal Self-Help

The FCC has stated unequivocally that an IXC's refusal to pay a LEC's legally tariffed access charges while receiving access services from the CLEC is impermissible "self-help" in violation of Section 201(b) of the Act.[9] Nevertheless, some IXCs have ceased paying tariffed

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[5] See Execunet II, 580 F.2d at 593 (citation omitted).
[6] See Great Lakes Communications Access Tariff, Tariff F.C.C. No.1 at 2-59 and 2-61 and Superior Telephone Cooperative Access Service Tariff, Tariff F.C.C. No. 1 at 12.
[7] See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co, FCC 07-175, File No. EB-07-MD-001 (Oct. 2, 2007) at ¶ 38.
[8] Id.
[9] See MGC Communications, Inc. v. AT&T Corp., 14 FCC Rcd 11647, ¶ 27 (1999).

access charges to LECs in what they call a "protest" to the higher access charges due to increased traffic.[10]

The FCC should clearly state that increased traffic to an exchange area is not a legitimate reason for any carrier to cease paying access charges or to stop providing service to LECs. In 2001, the Commission issued a Declaratory Ruling stating that IXCs could not refuse to carry traffic due to what they deemed to be "excessive" access charges: "[W]here the rates charged for an access service are presumptively reasonable at the time a service is offered, an IXC cannot refuse to exchange originating or terminating traffic with the CLEC, because such a practice would threaten to compromise the ubiquity and seamlessness of the nations telephone network."[11]

The Commission's rules and regulations provide several mechanisms to address allegations of unreasonable access charges, including formal complaints and tariff investigation mechanisms. Carriers alleging such unreasonable rates should seek relief through those mechanisms, rather than through self-help such as call-blocking or withholding payment of tariffed charges.[12]

Refusing to pay access charges is tantamount to denying service.[13] Futurephone was forced out of business due to various IXCs' refusal to pay legally tariffed access charges. Accordingly, Futurephone requests that the Commission specifically hold in this proceeding that IXCs may not refuse to pay LECs' legally tariffed access charges.[14]

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[10] See e.g., Farmers & Merchants at ¶ 28.
[11] See AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues, 16 FCC Rcd 19158, ¶ 15 (2001).
[12] Id. at ¶ 1.
[13] Id.
[14] See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers: Call Blocking by

Conclusion

For all the foregoing reasons, Futurephone respectfully requests the Commission preempt any state rulings contrary to federal access charge precedents. At the same time, the FCC could take this opportunity to clear the air about some core legal matters that keep recurring in these access charge disputes.

Respectfully submitted,

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Carriers, Declaratory Ruling and Order, 22 FCC Rcd 11629 (2007).